Supreme Court, U.S.
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No. 95-487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PROPAC-MASS, INC.,

Petitioner,

—v.—

LINDA RUTHARDT, COMMISSIONER OF INSURANCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

EDWARD B. DEUTSCH
(Counsel of Record)
ROBERT L. CLIFFORD
MCELROY, DEUTSCH & MULVANEY
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962-2075
(201) 993-8100

Attorneys for Petitioner,
PROPAC-MASS, INC.

14 pp

QUESTIONS PRESENTED

In this case, Petitioner's license to exchange contracts of reciprocal insurance was revoked by the Commissioner of Insurance of the Commonwealth of Massachusetts by a "Notice of Revocation of License," received by Petitioner on January 3, 1994, that indicated that Petitioner's license had been revoked effective December 31, 1993. Petitioner received no notice or hearing prior to the revocation. The Commissioner and the court below concluded that a trial of an unrelated contract action—during which petitioner was repeatedly informed that its license was not at issue—served as Petitioner's constitutionally-guaranteed hearing. Accordingly, the revocation raises the following significant questions:

(1) Whether Mass. Gen. Laws Ann. ch. 175, § 5 (West 1987), which permits the revocation of a license to transact business without affording an opportunity to be heard, violates the Due Process Clause of the United States Constitution.

(2) Whether the revocation of Petitioner's license without notice or an opportunity to be heard violated Petitioner's right to due process.

(3) Whether "notice" of the revocation of Petitioner's license, purportedly effective four days prior to receipt by Petitioner, violated its right to due process.

PARTIES BELOW

The parties to this case are those listed in the caption of this petition. PROPAC-MASS, Inc., a Massachusetts Corporation without a parent or any subsidiary corporations, was the creator of and attorney in fact for the subscribers of the Massachusetts Employers Insurance Exchange from its inception in 1989 until December 31, 1993. Respondent, Linda Ruthardt, is the Commissioner of Insurance of the Commonwealth of Massachusetts.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioner, PROPAC-MASS, Inc., respectfully prays that a writ of certiorari issue to permit review of the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINIONS BELOW

On December 31, 1993, the Commissioner of Insurance of the Commonwealth of Massachusetts issued a Notice of Revocation of License. (App. 10a-29a) On March 14, 1994, and March 29, 1994, a Single Justice of the Supreme Judicial Court of Massachusetts entered Orders denying the petition of PROPAC-MASS, Inc. seeking a stay of the Commissioner's license revocation and declaratory relief. (App. 8a-9a) The opinion of the Supreme Judicial Court of Massachusetts, issued on April 11, 1995, affirming the license revocation, is reported at 648 N.E.2d 407 (1995). (App. 1a-7a) On July 11,

1995, PROPAC-MASS, Inc. filed a Petition for a Writ of Certiorari. On July 31, 1995, this Court rejected the Petition on grounds that it had been filed one day late. On August 29, 1995, the Supreme Judicial Court denied Petitioner's Motion for Leave to Enlarge the Time to File Petition for Rehearing. (App. 36a) On September 7, 1995, the Supreme Judicial Court of Massachusetts denied the Petition for Rehearing filed by PROPAC-MASS, Inc. (App. 35a).

Petitioner acknowledges the uncertainty occasioned by the two Orders of the Supreme Judicial Court of Massachusetts, the first denying Petitioner's application to enlarge its time to file for rehearing and the second reciting that Court's consideration of the merits of the Petition for Rehearing and then denying the Petition. Petitioner's position is that inasmuch as the Court below has in fact considered the Petition for Rehearing, that Court's second Order controls. Petitioner is seeking clarification from the Court below.

JURISDICTION

The Supreme Judicial Court of Massachusetts rendered judgment on April 11, 1995. On September 7, 1995, that Court denied the Petition for Rehearing filed by PROPAC-MASS, Inc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1982).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution amend. XIV, § 1:

> No State shall * * * deprive any person of life, liberty or property, without due process of law * * *.

Mass. Gen. Laws. Ann. ch. 175, § 5 (West 1987):

The full text of the statute appears at App. 33a-34a.

STATEMENT OF THE CASE

A. Introduction. The facts of significance to this Court's determination whether review is necessary can be summarized very simply. On January 3, 1994, Petitioner received from the Massachusetts Commissioner of Insurance ("the Commissioner") a "Notice of Revocation" of its license to transact its insurance business. That Notice informed Petitioner that its license had, in fact, been revoked effective December 31, 1993—four days *prior* to receipt of the Notice. Petitioner received no notice or hearing before that revocation. The Massachusetts Supreme Judicial Court upheld the Commissioner's action 1) ascribing no constitutional significance to the fact that Petitioner did not receive notice of the loss of its license until after it had already been taken; and 2) holding that Petitioner had received its constitutionally-guaranteed hearing through a prior, unrelated trial of a contract action during which the parties, the court, and representatives of the Commssioner repeatedly acknowledged that Petitioner's license was not—and could not have been—at issue. The Commissioner's failure to provide Petitioner with notice of the revocation of its license or to conduct a hearing prior to the revocation's effective date was unjustified and deprived Petitioner of its constitutionally-guaranteed right to notice of the charges against it and an opportunity to meet them.

B. Facts. The Massachusetts Employers Insurance Exchange ("MEIE" or "the Exchange") is a reciprocal insurance exchange created under the Massachusetts Reciprocal Exchange Law, Mass. Gen. Laws Ann. ch. 175, §§ 94A-94M (West 1987) ("the Reciprocal Law"). A reciprocal insurance exchange is "an aggregation of individuals, partnerships or corporations, . . . called subscribers, who or which, under a common name, exchange contracts of insurance on the reciprocal or inter-insurance plan through the office of an Attorney

in Fact, being the place where contracts of insurance are issued." Mass. Gen. Laws Ann. ch. § 94A.[1]

From January 1, 1989, to December 31, 1993, Petitioner controlled and operated the Exchange as its Attorney in Fact. "Attorney in fact" is defined in the statute as "an individual, partnership or corporation acting under power of attorney as the representative of the subscribers in the exchange of reciprocal or inter-insurance contracts and matters incident thereto." *Id.* Subscribers are "the participants or policyholders, who have given to an Attorney in Fact a power of attorney giving authority to obligate them separately and severally . . . in the exchange of reciprocal or inter-insurance contracts." *Id.* In the case at hand, the subscribers are more than eight-hundred Massachusetts employers who have indemnified each other against losses and expenses associated with their obligation to provide workers' compensation benefits to their injured workers. Under the express terms of the Reciprocal Law, it is through the execution of individual but common powers of attorney, approved by the Commissioner, that each subscriber authorizes the attorney in fact to exchange contracts of insurance with all other subscribers on its behalf. *See* Mass. Gen. Laws Ann. ch. 175, §§ 94B, 94D (West 1987).

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[1] The nature of an exchange has been described as follows:

> a system of insurance under which several individuals may underwrite each other's risks against various hazards through an attorney-in-fact, *common to all*, under an agreement that each underwriter acts separately and severally and not jointly with any other. All the subscribers are insured and at the same time are insurers. . . . The attorney-in-fact represents each subscriber individually in exchanging insurance with others and is authorized to do every act that the subscriber could do in relation to the common enterprise. . . . All exchanges of insurance are effected through . . . the common attorney-in-fact. The subscriber pays a premium or membership fee to the exchange. From the premium a fixed percentage is deducted as the attorney-in-fact's fee.

In re International Re-Insurance Corp., 78 A.2d 744, 745-46 (Del.Super.Ct.1951), *aff'd*, 86 A.2d 647 (1952) (emphasis added).

In addition, the statute requires that an "advisory committee" composed of not fewer than three subscribers be elected or appointed, with the authority and duties specified in the power of attorney. Mass. Gen. Laws Ann. ch. 175, 94K.

On December 9, 1988, the Commissioner issued a license to Petitioner, authorizing it to execute contracts of reciprocal or inter-insurance for the subscribers of MEIE. On January 1, 1989, Petitioner began transacting business and executed inter-insurance contracts for the subscribers under the name MEIE. This was the first and only successful organization of a reciprocal exchange since the enactment of the Reciprocal Law in 1947.

As a direct result of the experienced, prudent, and disciplined management and oversight practices implemented by Petitioner in the operation of the Exchange, the subscribers enjoyed extremely favorable operating results, cost savings, and growth. Due to the success of the Exchange, the number of subscribers increased from the original fifty to more than eight-hundred by 1993. By year end 1993, premium volume was expected to exceed $65 million. The Exchange's surplus level was more than $21 million. In addition, MEIE was so successful under the direction, control, and management of Petitioner that it had set aside more than six million dollars in individual subscriber savings accounts, which amount was to be returned to subscribers as unused premiums.[2]

Petitioner's tenure as Attorney in Fact continued until year end 1993 when, in direct contravention of the protections afforded by the Due Process Clause of the United States Constitution, the Commissioner revoked its license pursuant to Mass. Gen. Laws Ann. ch. 175, § 5.[3] On December 31, 1993,

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[2] PROPAC's success contrasted markedly from the then-existing and widely-recognized "crisis" in the Massachusetts workers' compensation industry caused by "insufficient premiums" and a "$400 million deficit." Boston Globe, January 12, 1993, at 44.

[3] Mass. Gen. Laws Ann. ch. 175, § 94F (West 1987) provides that the license of an attorney in fact of a reciprocal insurance exchange is

the Commissioner issued the Notice of Revocation of License (App. 10a-15a), effective that day. The "Notice" was sent to Petitioner via registered mail. Petitioner did not receive the "Notice" until January 3, 1994, *four days after* the Commissioner had revoked its license.[4]

The license revocation was based, in large part, on an opinion issued on December 30, 1993, by a Judge of the Superior Court of the Commonwealth of Massachusetts in an action for breach of contract brought against Petitioner by the advisory committee of the Exchange. (App. 16a-29a) A discussion of that action and the opinion is necessary to a complete understanding of the issues raised in this petition.

Contract Litigation And Opinion Of The Massachusetts Superior Court

On December 9, 1988, the date on which the Commissioner issued Petitioner its license, Petitioner and two of the organizers of MEIE entered into an Attorney-in-Fact Agreement ("the Agreement"). The Agreement contained two provisions by which the subscribers of MEIE could terminate it.

Paragraph 16 of the Agreement, which had an initial term of five years, provided, among other things, that either *party* could terminate the contract by providing one year's prior written notice. The Agreement further provided that, should

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subject to § 5. Section 5 sets forth the circumstances in which the Commissioner may revoke the licenses of foreign insurance companies and attorneys in fact of reciprocal insurance exchanges.

[4] Pursuant to the terms of Mass. Gen. Laws Ann. ch. 175, § 5, on January 11, 1994, Petitioner sought review of the license revocation before a Single Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts on grounds, among others, that the revocation violated due process. The Commissioner filed an answer on February 25, 1994. The Single Justice held a hearing on March 9, 1994. By orders dated March 14, 1994, and March 29, 1994 (App. 8a-9a), the Single Justice summarily denied Petitioner's application. Pursuant to the statute, Petitioner appealed to the full court of the Supreme Judicial Court on May 31, 1994.

such notice be given by either party, both parties were to cooperate in the transfer of management service functions.

By letter dated December 4, 1992, the advisory committee of MEIE informed Petitioner that it had decided to terminate the Agreement effective December 31, 1993, pursuant to paragraph 16. Petitioner challenged the attempted termination, asserting that the Agreement was invalid from its inception as contrary to the Massachusetts statutory scheme regarding reciprocals, or, in the alternative, that the advisory committee had no authority to effect a termination without cause under Paragraph 16.[5] On August 20, 1993, Petitioner filed a complaint in the Massachusetts Superior Court against the advisory committee and others seeking, among other relief, a declaratory judgment that the committee lacked authority to terminate the Agreement or replace Petitioner as Attorney in Fact.

On August 23, 1993, MEIE, and the Associated Industries of Massachusetts, Inc. ("AIM"),[6] filed a complaint against Petitioner in Massachusetts Superior Court, claiming that Petitioner had been properly terminated and had breached the Agreement by allegedly failing to cooperate in an orderly

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[5] The Reciprocal Law does not allow the submission of an Attorney in Fact Agreement, such as was executed by Petitioner and the two organizers, as part of the regulatory approval process of an exchange. Accordingly, and as Petitioner argued in the contract action, the Agreement, from its inception, was invalid under the statutory scheme. *See* Mass. Gen. Laws Ann. ch. 175, § 94D. Under the express terms of the statute, it was through the individual powers of attorney executed by each subscriber that Petitioner was given the power to exchange contracts of insurance on their behalf and conduct the affairs of the Exchange. Accordingly, it was only through the cancellation of the individual powers of attorney that Petitioner's status as attorney in fact could be terminated.

[6] AIM, a trade association of Massachusetts businesses, was the sponsor of MEIE, which enlisted Petitioner to form the Exchange. AIM is also the parent of MEIE-AIF, the entity that was improperly licensed by the Commissioner to replace Petitioner as attorney in fact and that ultimately gained control of its lucrative business.

transition of Petitioner's duties to the entity purporting to be MEIE's new Attorney in Fact. The complaint also alleged violations of the implied covenant of good faith and fair dealing and Massachusetts' Unfair Trade Practices Law, Mass. Gen. Laws Ann. ch. 93a (West 1987). Prior to the resolution of the litigation concerning the issue whether Petitioner could be terminated without cause by the advisory committee, the Commissioner improperly licensed a new attorney in fact to replace Petitioner effective January 1, 1994. *See* n.6.

A bench trial of that action commenced in the Massachusetts Superior Court on December 2, 1993. Petitioner's license was expressly *not* at issue—nor could it have been—in that case. On December 30, 1993, the trial court issued its Findings of Fact and Conclusions of Law, holding that Petitioner had breached the Agreement and the implied covenant of good faith and fair dealing, and had violated Mass. Gen. Laws Ann. ch. 93a. (App. 16a-29a) Also on December 30, 1993, the Commissioner required that Petitioner attend a meeting at her office at which the main subject of discussion was the issuance of the Superior Court's Findings of Fact and Conclusions of Law. During the entire course of the meeting, the Commissioner never mentioned the subject of the revocation of Petitioner's license.

The following day, the Commissioner revoked Petitioner's license pursuant to Mass. Gen. Laws Ann. ch. 175, § 5, on grounds that Petitioner had engaged in conduct that rendered its further transaction of business hazardous to the public. Before revoking the license, the Commissioner gave no notice, conducted no hearing, and made no findings of fact on that issue.

Conceding that she had afforded Petitioner no opportunity to be heard prior to the license revocation, the Commissioner, nonetheless, contended below that Petitioner had been afforded due process by the trial of the contract litigation. The trial did *not* provide, and could not have provided, Petitioner

with a hearing on the issue before the Commissioner under Mass. Gen. Laws Ann. ch. 175 § 5: whether Petitioner's continued transaction of business would be hazardous to the public or to the subscribers to the Exchange.[7] Rather, the three issues before the Superior Court were (1) the validity of the Agreement between Petitioner and the Exchange and whether the Exchange's advisory committee, a non-party to that agreement and this litigation, could terminate it; (2) whether Petitioner breached the implied covenant of good faith and fair dealing contained in that agreement; and (3) whether Petitioner violated Mass. Gen. Laws Ann. ch. 93a.

Moreover, even could the revocation of the license have been addressed in the contract action, the Commissioner's failure to so notify Petitioner—and thus enable it to prepare a defense—misled Petitioner and denied it due process of law. The subject of Petitioner's license had surfaced several times during the trial in the Superior Court. The parties, the trial judge and *representatives of the Division of Insurance* consistently and unequivocally agreed that Petitioner's license was not at issue in that proceeding. Indeed, the precise question whether Petitioner's license had been at issue in that proceeding had been specifically addressed on at least three separate occasions. On the fifth day of testimony, counsel for Petitioner informed the Court that he was

> concerned that, in fact, the license of PROPAC- MASS is somehow at issue. And one of the concerns we've had, and we've raised this issue, is that the license does not—is not impacted by this agreement. This agreement does not give rise to the license. So, we are arguing—
>
> THE COURT: No, but you're being sued in breach of contract.

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[7] Section 5 provides the only mechanism for revocation of the license of a domestic attorney in fact, and that power may be exercised solely by the Commissioner of Insurance and only in the limited circumstances set forth in the statute.

MR. BEHAR: That's right.

THE COURT: Nothing to do with the license, as I understand it.

* * *

THE COURT: . . . [I]t looks to me that this case is, one, a breach of contract case; number two, breach of the implied covenant of good faith and fair dealing under a breach of contract case.

MR. KAPLAN: Exactly so, Your Honor.

THE COURT: And number three, a 93A action or actions taken to frustrate the terms of a contract that the parties agreed to perform.

MR. KAPLAN: Exactly, Your Honor.

THE COURT: And that is the extent of it. And [the] license has got nothing to do with it. Is that correct?

MR. KAPLAN: Yes, Your Honor.

THE COURT: All right. . . . So, we now know, Mr. Behar, that [the] license has got nothing to do with it.

In his closing argument counsel for the advisory committee again conceded that

> [w]hen the discussion gets to licensure and no licensure, Your Honor, I submit those are all regulatory matters for the Commissioner. If you don't like the result, that's what chapter 30A is all about. We are here only on the terms of the contract . . . .

That the license had not been at issue was emphatically confirmed again by the trial court at a post-trial hearing held on January 6, 1994, to address the form of the judgment. Significantly, the Assistant General Counsel and Deputy General Counsel of the Division of Insurance were present at and par-

ticipated in that hearing. At the hearing, counsel for the advisory committee again stated that

> [t]he issue of PROPAC's license was not before the court. We have not asked the court to enter any relief with respect to that license, and in fact today it seems to me that any relief with respect to the issue of that license itself is with the SJC.

When Petitioner's then-counsel later broached the subject of the license revocation, the trial court interrupted and precluded him from discussing the license:

> THE COURT: You're aware that the matter—you are keenly aware that matter of revocation was never before me.
>
> MR. BEHAR: I am aware of that. It has been brought to Your Honor's attention—
>
> THE COURT: I'm speaking, it was not an issue in a [sic] lawsuit.

The Commissioner's representatives, who actively participated in that hearing, voiced no objection to the court's statements. Yet, in response to Petitioner's later due-process challenge to the license revocation in the court below, the Commissioner asserted that "the trial in the Superior Court gave all the process due" Petitioner on the license-revocation issue. The Commissioner's designation of that trial as Petitioner's "hearing," after having remained silent as Petitioner was prevented by the trial court from addressing the license issue, constitutes a disingenuous denial of due process of law.

C. The Opinion Below. Following the license revocation and pursuant to M.G.L. c. 175, § 5, Petitioner appealed to the Supreme Judicial Court, arguing that the Commissioner's revocation of its license was improper because, *inter alia*, 1) Mass. Gen. Laws Ann. ch. 175 § 5 violates due process by permitting a license revocation without affording a prior hearing; 2) Peti-

tioner was denied any hearing regarding the sole issue of importance in respect of the license revocation, namely, whether Petitioner's continued licensure would be hazardous to the public; and 3) due process mandated that PROPAC receive notice of the revocation of its license before the revocation became effective.

The court below completely disregarded the constitutional deficiencies in the Commissioner's actions. The court avoided deciding the validity of Section 5, summarily holding that the decision rendered in the contract action (the same hearing that had been described as having "nothing" to do with Petitioner's licensure by opposing counsel, the court, and the Commissioner's office) was Petitioner's "hearing" on the issue of whether Petitioner's continued licensure was "hazardous to the public or policyholders." In addition, the Supreme Judicial Court ascribed no constitutional significance to the fact that Petitioner did not learn of the revocation of its license until three days after the Commissioner had revoked it.

For the reasons enumerated herein, the actions of the Commissioner clearly violated due-process protections. The Supreme Judicial Court's judgment ignored controlling precedent of this Court regarding procedural due process. This Court should grant certiorari to address the significant constitutional issues erroneously decided or ignored below.

REASONS FOR GRANTING THE WRIT

I

THE REVOCATION OF ITS LICENSE WITHOUT PRIOR NOTICE AND AN OPPORTUNITY TO BE HEARD VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION

The revocation of Petitioner's license without prior notice and an opportunity to be heard violated Petitioner's right to due process guaranteed under the Fourteenth Amendment to the United States Constitution. The decision of the court below upholding that revocation must be reviewed because (1) the court deprived Petitioner of due process through the inappropriate application of collateral estoppel; (2) the statute on which the revocation was predicated, because it allows revocation of a license without a prior hearing, violates due process and controlling precedent; and (3) the revocation was without notice and therefore violated due process.

Mass. Gen. Laws Ann. ch. 175, § 5 ("Section 5"), among other things, sets forth the circumstances in which the license of a foreign insurance company can be revoked by the Commissioner of Insurance. Section 5 states, in relevant part, that

> [i]f the Commissioner is satisfied, upon examination or other evidence submitted to him, that any foreign company is insolvent or in an unsound financial condition, or that its business policies or methods are unsound or improper, or that its condition or management is such as to render its further transaction of business hazardous to the public or its policyholders . . . he shall revoke the license issued to said company . . . . *He shall give written notice to the company specifying the date on which said revocation . . . shall be effective* . . . and the ground for such revocation. . . provided, that if the ground for revocation . . . is that the company has vio-

> lated any provision of law or has failed to comply with its charter, the effective date of such revocation . . . shall be not less than ten days from the issue of said notice. . . . A company aggrieved by a revocation . . . of its license hereunder, may within ten (10) days from the effective date of such revocation . . . file a petition in the Supreme Judicial Court for the County of Suffolk for a review of such action of the Commissioner. The court shall summarily hear and determine the question whether the ground for such revocation . . . specified in the Notice of the Commissioner exists and may make an appropriate order or decree. If the order or decree is adverse to the petitioning company it may within ten (10) days therefrom appeal to the full court.

(Emphasis supplied). Under Mass. Gen. Laws Ann. ch. 175, § 94F, the license of an attorney in fact of a reciprocal insurance exchange is subject to Section 5.

The Commissioner revoked Petitioner's license to transact business as the Attorney in Fact for MEIE pursuant to Section 5. The deprivation of Petitioner's property interest in its license was accomplished before Petitioner received notice of the revocation and was afforded an opportunity to "present [its] case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). The court below improperly affirmed that denial of due process. That decision conflicts with applicable precedents of this Court and therefore must be reviewed.

A. The Court Below Deprived Petitioner Of Due Process Through The Improper Invocation Of Collateral Estoppel.

This Court has placed strict constitutional limits on the use of collateral estoppel. *See, e.g., Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, *reh'g denied*, 458 U.S. 1133

(1982). Those limits prohibit issue preclusion unless the party estopped had a full and fair opportunity to litigate the issue and a factual determination against that party had been made. Contrary to the opinion of the court below, no such prior determination occurred in this case. The result below thus conflicts with this Court's collateral estoppel—due process analysis in *Blonder-Tongue*, *Parklane Hosiery*, and *Kremer*.

To avoid constitutional scrutiny of both the statute and the Commissioner's failure to afford even minimal due-process protections before revoking Petitioner's license, the court below held that Petitioner was bound by the findings of fact made by a judge in a prior Massachusetts Superior Court action that did not provide Petitioner with a hearing on the issue governing the revocation of its license: whether Petitioner's continued transaction of business would be hazardous to the public or the subscribers of the Exchange. Rather, the Superior Court action involved litigation of an unrelated contract dispute, which included a claim for breach of contract, an alleged violation of the implied covenant of good faith and fair dealing, and an alleged violation of the Massachusetts Unfair Trade Practices Law, Mass. Gen. Laws Ann. ch. 93a. In ruling on those purely contractual issues, the Superior Court never addressed the issue facing the Commissioner regarding the continued licensure of Petitioner as Attorney in Fact of the Exchange.

Moreover, as set forth in the statute, and as specifically and repeatedly acknowledged by the trial court itself, the parties to that action, *and representatives of the Division of Insurance*, the issue of the revocation of Petitioner's license could not have been decided in that forum. *See*, *supra* at 8 n.7. Thus, the Commissioner's fallacious reliance on that unrelated proceeding to revoke petitioner's license without affording due process was improper. It was also misleading. Although presented with the opportunity, the Commissioner declined to inform Petitioner of her plan to use the trial court's findings as the basis for the intended license revocation. Had that intent

been communicated, Petitioner would then have had *some*, albeit minimal, notice and an opportunity to contest the revocation prior to its effective date.

The lower court's rote affirmance of that blatant denial of fundamental due-process protections was erroneous. Because the issue necessary to the license revocation was not and could not have been litigated in the prior proceeding, the invocation of the doctrine of collateral estoppel by the court below likewise was simply wrong. Because Petitioner was thus denied notice and an opportunity to contest the revocation before it took effect, Petitioner was denied due process and review by this Court is warranted.

B. The Failure Of The Court Below To Apply The Minimal Requirements Of This Court's Procedural Due Process Holdings Is Unconstitutional.

The court below improperly avoided deciding the question whether Section 5 violates due-process requirements because it does not require a pre-revocation hearing. Section 5 denies due process to entities subject to its provisions because it provides for *no* opportunity to contest a license revocation prior to its accomplishment. Under well-settled precedents of this Court, resort to a post-deprivation hearing is permissible only in extraordinary circumstances in which there has been a demonstrated governmental interest that justifies postponing the hearing until after the event. *Boddie v. Connecticut*, 401 U.S.371, 379 (1971). No valid governmental interest was demonstrated below. Accordingly, review of the constitutionality of the statute is appropriate at this time.

This Court has described the "central meaning" of procedural due process as follows: " 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). The "root requirement" of due process is that "the right to notice and an opportunity to be heard

'must be granted at a meaningful time and in a meaningful manner.' " *Id.* at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).[8]

The opportunity for a hearing must be given before the deprivation of a property interest "except for extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event." *Boddie, supra*, 401 U.S. at 379. *See also Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 n.7 (1972) (stating that instances that justify deprivation of protected interest without prior hearing are "rare and extraordinary"). When "protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents, supra*, 408 U.S. at 569-70.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court articulated a three-part balancing test to determine whether government procedures satisfy due-process requirements. Under *Mathews*, "the specific dictates of due process" require consideration of

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. With few exceptions, this Court has held that government procedures that afford hearings only *after* the deprivation of a property right violate due process.

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[8] The right to a prior hearing attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection. *Fuentes, supra*, 407 U.S. at 84. A license issued by the government is a property interest protected by the Due Process Clause. *See Bell v. Burson*, 402 U.S. 535, 539 (1971).

At issue in *Fuentes*, *supra*, was the constitutionality of two prejudgment replevin statutes, neither of which provided for notice or an opportunity to be heard prior to the State's seizure of goods. 407 U.S. at 80. Like Section 5, both statutes provided only for post-deprivation hearings. The issue in *Fuentes*, as in this case, was whether procedural due process required an opportunity for a hearing *before* the State seized the property. *Id.* In holding the statutes unconstitutional, the Court observed that

> [t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the state seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.
>
> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . [And n]o better instrument has been devised for arriving

> at truth than to give a person in jeopardy a serious loss notice of the case against him and opportunity to meet it."

Id. at 80-81 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)) (omission in original) (citations omitted). Citing its previous "tolerat[ion]" of variances in the *form* of a hearing " 'appropriate to the nature of the case' and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],' " *id.* at 82 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), and *Boddie*, *supra*, 401 U.S. at 378), the Court reiterated its traditional insistence that "whatever its form, opportunity for that hearing must be provided *before* the deprivation at issue takes effect." *Id.* at 82 (citing *Bell*, *supra*, 402 U.S. at 542) (emphasis added) (other citations omitted). The Court further commented on the ineffectiveness of a *post*-deprivation hearing:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This court has not . . . embraced the general proposition that a wrong may be done if it can be undone."

Id. at 81-82 (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1971)).

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545 (1985), plaintiffs challenged the constitutionality of statutory dismissal procedures that did not provide a tenured

public employee an opportunity to respond to charges against him prior to dismissal for cause. As in this case, plaintiffs were entitled to judicial review following the discharge. *Id.* at 547-48.

Applying the *Mathews* criteria, the Court held the statutes constitutionally defective for failing to provide " 'some kind of a hearing prior to termination.' " *Id.* at 542 (quoting *Board of Regents*, *supra*, 408 U.S. at 570). The Court noted that the hearing need not be a "full adversarial evidentiary hearing" and "need not definitively resolve the propriety of the discharge." *Id.* at 545. Rather, the hearing need only afford

> an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. . . . The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Id. at 545-46 (citations omitted).

Under *Mathews*, "the factor which calls most strongly for a pre-enforcement hearing is the risk of an erroneous deprivation of a property right." *Application of the United States*, 610 F.2d 1148, 1157 (3d Cir. 1979). In that case the court considered whether a district court was required to provide a hearing before requiring a telephone company to assist the government in tracing telephone calls. In holding that a pre-enforcement hearing was required, the court noted that "[w]ithout a prior hearing a district court is not likely to learn that a tracing order is too burdensome until after the company has carried out the order." *Id.* The court noted that the rights at issue are of "primary importance to a large business enter-

prise. Companies should not lose a meaningful opportunity to protect those rights without substantial reasons." *Id.*

The foregoing precedents overwhelmingly demonstrate that Section 5 unconstitutionally works a deprivation of property without due process of law insofar as it denies the right to be heard prior to a license revocation. Section 5 does not provide for an opportunity to be heard at "a meaningful time and in a meaningful manner." *Armstrong*, *supra*, 380 U.S. at 552. The statute requires only that if the Commissioner is "satisfied" that a company's "condition or management is such as to render its further transaction of business hazardous to the public or its policyholders," the Commissioner send "written notice . . . specifying the date on which such revocation . . . shall be effective . . . and the ground for such revocation." In addition, Section 5 does not require the Commissioner to make any *findings of fact* concerning that determination.

Section 5 provides for post-revocation review by a Single Justice of the Supreme Judicial Court, who is required "summarily [to] hear and determine the question whether the ground for revocation . . . specified in the notice of the commissioner exists." If the only requirements imposed on the Commissioner are those in Section 5, how a Single Justice can review the Commissioner's action is unclear. Without the benefit of a prior hearing or even a requirement that the Commissioner make findings of fact, the reviewing justice is required to examine only the Commissioner's blanket statement that a ground for revocation exists. Clearly, without findings on all material issues presented by the record, the reviewing court cannot properly exercise its appellate function. Under Section 5, not only do no findings presented by the record exist—*no record exists*.

Balancing the three interests outlined in *Mathews*—which the court below declined to do—compels the conclusion that the procedures afforded under Section 5 are constitutionally defective. First, the significance of Petitioner's private interest in retaining its license—indeed, its means of livelihood—

"cannot be gainsaid." *Cleveland Bd. of Educ.*, *supra*, 470 U.S. at 543. Procedural due process requires confrontation and cross-examination of those whose word deprives a person of his or her livelihood. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103 (1963). The observation of this Court in *Cleveland Bd. of Educ.*, *supra*, 470 U.S. at 543, concerning the "fired worker" who may be able to find employment elsewhere but will be burdened by "the questionable circumstances under which he left his previous job," is even more compelling as applied to Petitioner. As a result of the revocation, Petitioner will be precluded from conducting any insurance-related business in the Commonwealth of Massachusetts without having had any opportunity to contradict its accusers. The ability of its principals to become licensed as attorneys in fact for exchanges in other states likewise has been effectively vitiated. The revocation of Petitioner's license, even if ultimately reversed, has irrevocably damaged the reputations of its principals. No demonstrated governmental interest in immediate revocation outweighs those interests. *See Greene v. McElroy*, 360 U.S. 474 (1959) (finding that revocation of security clearance effectively disqualified aeronautical engineer from future work in his entire field and therefore entitled him to pre-deprivation hearing); *Phillips v. Vandygriff*, 711 F.2d 1217, 1222 (5th Cir. 1983) (" 'the right to work in the common occupations is the very essence of the personal freedom and opportunity' " that due-process requirement seeks to protect (quoting *Traux v. Raich*, 239 U.S. 33, 41 (1915))), *clarified on reh'g*, 724 F.2d 490, *cert. denied*, 469 U.S. 821 (1984).

As in *Phillips* and *Greene*, the Commissioner's action in this case has extinguished the employment prospects of Petitioner's principals, both of whom have dedicated the majority of their professional lives to the insurance industry. The facts cannot be stated more simply: the Commissioner took Petitioner's means of livelihood and, without compensation, gave it to someone else. In fact, AIM, a subscriber and one of

the plaintiffs in the contract action, ultimately gained control of the Exchange by securing, with the aid of the Commissioner, the licensure of MEIE-AIF, AIM's wholly-owned subsidiary, as the new Attorney in Fact for the Exchange.

Second, consideration of the "factor that calls most strongly for a pre-enforcement hearing"—the risk of an erroneous deprivation of property and the probable value of additional or substitute procedural safeguards—demonstrates that Petitioner was entitled to a prior hearing. *See Application of United States, supra*, 610 F.2d at 1157. As outlined above, the risk of an erroneous deprivation of property is extreme if the Commissioner is not required to create any record, make any findings of fact, or allow the company whose license is to be revoked a chance to address the charges or offer evidence to rebut those charges.

Equally significant is the manifest fact that the requirement of a prior hearing carries no severe burden for the Division of Insurance. Indeed, the public interest is best served in such a case by requiring a preliminary, public hearing. A determination concerning the license of an exchange not only affects the licensee, but also has a *substantial* impact on the exchange's subscribers. The revocation of Petitioner's license (and its *de facto* revocation by virtue of the Commissioner's improper licensing of a second Attorney in Fact[9]) also inter-

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[9] Unquestionably, only one attorney in fact may act for a reciprocal exchange at any given time. *See* Mass. Gen. Laws Ann. ch. 175, § 94D. That being so, the Commissioner's licensing of MEIE-AIF as "successor Attorney-in-Fact" on October 22, 1993, when Petitioner's license was intact and Petitioner was servicing the Exchange, constituted a *de facto* revocation of Petitioner's license for which Petitioner was not afforded notice and an opportunity to be heard. *See, e.g., Febish v. New York State Lottery Control Comm'n*, 224 N.Y.S.2d 520, 523 (1961) (holding that where license specified sites of proposed bingo games, commissions ruling that bingo would no longer be played at sites amounted to a *de facto* revocation of license without required notice); *Hadges v. Yonkers Racing Corp.*, 845 F.Supp. 1037, 1040 (S.D.N.Y. 1994) (holding that Racing Corporation's decision to bar plaintiff from racing at

fered with the contractual rights and insurance coverage of each of the more than eight-hundred subscribers of the Exchange. The interests of the subscribers would have been best served by ensuring that a revocation of Petitioner's license was based on correct determinations of fact and reasoned conclusions concerning the danger, if any, involved in PROPAC's continued transaction of business. Any purported interest in immediate revocation cannot and does not outweigh the obvious interest of the subscribers in being fully informed on issues of critical importance to at least the perceived effect of the displacement of their Attorney in Fact on their continued insurance coverage. Providing a hearing would have afforded the requisite assurance and would have imposed neither a significant administrative burden nor intolerable delay.

Finally, the government interests involved do not justify dispensing with the prior-hearing requirement. Petitioner recognizes that the Division has an interest in protecting the public from practices of a foreign insurance company, to which it may not have immediate access, that appear contrary to the public good. Foreign insurance companies "as distinguished from domestic companies generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state." *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 585 (1935). That interest, however, is simply not implicated with a domestic exchange and is not served by arbitrary and uninformed actions by the Commissioner. In fact, that interest is severely jeopardized when a government official takes action of the kind taken in the present case.

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raceway "served as a *de facto* revocation of his state racing license because the other harness racing tracks would follow [Corporation's] lead and bar him from their facilities as well," noting that "[e]ssential . . . is plaintiff's claim that there is a secret agreement among all of the trotting tracks that barring a license from one will result in the applicant being barred from all").

Scrutiny of Section 5 under *Mathews* and the other applicable precedents reveals its constitutional invalidity as it applies to the attorney in fact of a domestic insurance exchange such as Petitioner. The statute's provision of a post-revocation hearing does not provide for an opportunity to be heard at a meaningful time and in a meaningful manner. The government's interest in immediate revocation does not outweigh the "obvious value in reaching an accurate decision." *Cleveland Bd. of Educ.*, *supra*, 470 U.S. at 543. As was noted in that case, "[e]ven where the facts are clear, the appropriateness or necessity of the [revocation] may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be *before* the termination takes effect." *Id.* (emphasis added). Because the statute provides for no such opportunity, review by this Court is necessary, and the statute should be stricken.

C. The Decision Of The Court Below Upholding The Commissioner's Failure To Give Petitioner The Statutorily- And Constitutionally-Required Notice Prior To The License Revocation Conflicts With Applicable Decisions Of This Court And Denied Petitioner Due Process.

Due process requires *both* notice and an opportunity to be heard. The notice under due process must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, *supra*, 339 U.S. at 314. "The right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest . . . ." *Id.* The Commissioner revoked Petitioner's license on December 31, 1993, "effective immediately." Thus, in contravention of the express requirements of the statute, and, more important, prior decisions of this Court, no notice of revocation was given. The applicable precedents require,

at a minimum, that notice precede the deprivation of a property interest.

In *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), the Court considered the constitutionality of the notice provided by a utility company to a customer stating that payment was overdue, that the notice was a "final notice" and that utility service would be terminated if payment was not tendered by a specified date. *Id.* at 13. The notice failed to inform the customer of the availability of an avenue of redress to contest a particular charge. *Id.* The Court found that the notice failed to satisfy due-process requirements, saying:

> Petitioners' notification procedure, while adequate to apprise the Crafts of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. *Mullane v. Central Hanover Trust*, supra, at 314, 70 S.Ct. at 657. *The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for*, an impending "hearing."

Id. at 14 (emphasis added). *See also Cohen v. City of Philadelphia*, 736 F.2d, 81, 84 (3d Cir. 1984) ("The right to a hearing is certainly of little value without prior notice of the charges presented, in sufficient detail fairly to enable the party charged to demonstrate any error that might exist."); *Arnett v. Kennedy*, 416 U.S. 134, 170-71 (holding that due process required that tenured public employee receive notice of charges against him and explanation of employer's evidence), *reh'g denied*, 417 U.S. 977 (1974).

Completely ignoring those basic principles of due process and fundamental fairness, the court below upheld the Commissioner's revocation of the license without any prior notice to Petitioner. Section 5 requires the Commissioner, *prior* to the license revocation, to "give *written notice* to the company specifying the date on which said revocation . . . *shall be*

effective . . . and the ground for such revocation . . . ." Due process, the plain language of the statute, and common experience require that the notice given by the Commissioner *precede* the actual license revocation. The use of the word "shall" indisputably contemplates future action. Constitutionally implicit in that requirement is that the notice "enable the party charged to demonstrate that any error might exist." *Cohen*, *supra*, 736 F.2d at 84.

The Commissioner's failure to provide *any* notice of the license revocation violated due process because Petitioner was not "informed that the matter was pending." *Mullane*, *supra*, 339 U.S. at 314. The Commissioner issued the Notice of Revocation of License on December 31, 1993. (App. 10a-15a) The Notice expressly stated that it was effective *that day*: "it is hereby ordered that Petitioner's license is revoked, effective immediately." (App. 14a) The "Notice" of Revocation was sent by registered mail to PROPAC and was not received until January 3, 1994, *four days after* the license had been revoked.[10] Thus, in clear violation of Section 5, and of all due

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[10] The action of the Commissioner is rendered even more egregious by the fact that on December 30, 1993, the day before the revocation, Petitioner's principals met with the Commissioner in her office to discuss, among other things, the decision of Judge Roseman in the breach-of-contract case. The Commissioner did not, during the entire course of that meeting, even hint at the fact that she was contemplating a revocation of Petitioner's license. Had she done so at that time, she would, at the very least, have put PROPAC on notice of the impending revocation and given it some form of "opportunity to present [its] objections." *Memphis Light*, *supra*, 436 U.S. at 14. As the *Memphis Light* Court noted, "The opportunity for informal consultation with designated personnel empowered to correct a mistaken determination constitutes a 'due process hearing' in appropriate circumstances." *Id.* at 16 n.17. Petitioner does not concede that such an "informal consultation" would have sufficed in this case, but refers to the procedure only to highlight the Commissioner's complete disregard of her constitutionally imposed obligation to preserve Petitioner's due process rights. The Commissioner's failure to provide *any* notice to Petitioner of the revocation of its license renders her action, and the revocation itself, constitutionally defective.

process requirements, PROPAC received no notice of the revocation of its license as Attorney in Fact for MEIE. *See Chrisley v. Morin*, 511 N.Y.S.2d 753, 754 (4th Dept. 1987) (annulling as "constitutionally [un]acceptable" decertification of plaintiff's business enterprise status where no notice was given "that her certification was in jeopardy prior to her decertification" and where she was not "given an opportunity to submit any evidence on her own behalf").

Noting that Section 5 provides that a revocation based on grounds that a company violated a provision of law or failed to comply with its charter—neither of which is implicated in this case—may not be effective in less than ten days from the date of the issuance of the notice (App. 33a), the below court correctly observed that revocations for any other reason have no such statutorily-imposed time limitation.[11] Disregarding entirely any concept of fundamental fairness, the court below could "see no reason why," in this case, the Commissioner could not "announce that the license is revoked effective immediately." (App. 6a-7a) Even more incredibly, the court further saw no "reason to declare the revocation invalid, even if immediate revocation were not authorized." (App. 7a) The court below ascribed no significance to the failure to provide notice prior to the effective date, even though that left Petitioner with only seven days to prepare its initial appeal to the Single Justice rather than the ten days accorded under the statute.

The court below failed or refused, without justification, to consider the constitutional implications of permitting the deprivation of a significant property interest without notice. Due process requires that this Court consider the question.

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[11] The statute provides, in pertinent part, that if the

> ground for revocation . . . is that the company has violated any provision of law or has failed to comply with its charter, the effective date of such revocation . . . shall be not less than ten days from the date of issue of said notice. . . .

Mass. Gen. Laws Ann. ch. 175, § 5. (App. 33a)

CONCLUSION

For all the reasons set forth above, Petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

EDWARD B. DEUTSCH
(Counsel of Record)
ROBERT L. CLIFFORD
MCELROY, DEUTSCH & MULVANEY
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962-2075
(201) 993-8100

Attorneys for Petitioner,
PROPAC-MASS, Inc.

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